Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

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Cases split on attorney fee sanction to attorney acting in pro per. *Musaelian v. Adams* (Cal. App. First Dist., Div. 4; July 26, 2007) (Case No. A112906) [2007 DJDAR 11365], reversed a sanction award under Code Civ. Proc. §128.7 in the form of attorney fees awarded to lawyers who had represented themselves. The court held that such an award is not proper where the prevailing parties appeared in pro per, even though they are lawyers. In so holding the court disagreed with two earlier cases: *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, [112 Cal.Rptr.2d 119] and *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, [48 Cal.Rptr.2d 429].

Remember that under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, [369 P.2d 937; 20 Cal.Rptr. 321], a trial court may follow either precedent until the Supreme Court settles the issue, which it may very well do by granting review in *Musaelian*. As distinguished from federal procedure, the trial court can follow a precedent set in another appellate district and disregard the decision in the district where the trial court is located.

Fax filing in Fourth District Court of Appeal. Beginning October 1, 2007, all three Divisions of the Fourth District will accept "fax filings" of certain documents. These are: requests for abandonment; requests for dismissal; substitution/association of counsel; change of address notices; bankruptcy status letters; certificates of interested entities or persons; Attorney General concession letters; *Sade C.* letters (in juvenile dependency matters); and civil case information statements.

Appellate records, exhibits, transcripts, and briefs will not be accepted for fax filing. The rule is already in effect in Division 1 of the Fourth District. To learn more about the process check www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/faxfiling.htm.

The Evidence Code applies in marital dissolution cases. Apparently to the surprise of many family lawyers and contrary to the practice in many courts, the California Supreme Court has made it clear that the rules governing civil trials apply with equal effect in marital dissolution cases. In *Elkins v. Sup.Ct.* (*Elkins*) (Cal.Supr.Ct.; August 6, 2007) 41 Cal.4th 1337, [163 P.3d 160; 63 Cal.Rptr.3d 483, 2007 DJDAR 11939], the court held that judicial efficiency did not supplant the requirements of the *Evidence Code*. It held invalid rules of the Contra Costa County Superior Court that permitted the use of hearsay declarations in lieu of testimony in marital trials.

You cannot sue a casino on tribal land in state court. An employee of the Barona casino allegedly knocked Ms Lawrence down, causing serious injuries. Not surprisingly, she sued the casino. But in the wrong place. *Lawrence v. Barona Valley Ranch Resort and Casino* (Cal. App. Fourth Dist., Div 1; August 3, 2007) 153 Cal.App.4th 1364, [64 Cal.Rptr.3d 23, 2007 DJDAR 11882] held that, under federal law, an Indian Tribe has sovereign immunity and, absent a waiver, cannot be sued in state court. The tribe waived its immunity in a compact with the state, but this did not mean that it could be sued anywhere other than in a tribal court.

Revival of lapsed sexual abuse claims does not revive government claims time limits. *Code Civ. Proc.* §340.1(c) revived, for the calendar year 2003, causes of actions for childhood sexual abuse that had lapsed because of expiration of the statute of limitations. Relying on the statute, plaintiff sued a school district contending she had been molested by a teacher some 25 years earlier. The trial court dismissed the action, based on her failure to present a timely government claim under the Tort Claims Act. The Court of Appeal reversed, holding that §340.1(c) also extended the deadline for presenting a claim to a public entity. The Supreme Court sided with the trial court and reversed the Court of Appeal. The court held that §340.1(c) only revived causes of action that had been barred "solely" by the expiration of the statute of limitations. The statute does not extend the time for filing government claims. *Shirk v. Vista Unified School District* (Cal.Supr.Ct.; August 20, 2007) 42 Cal.4th 201, [64 Cal.Rptr.3d 210, 164 P.3d 630, 2007 DJDAR 12610] (As Mod. October 10, 2007).

Sending by "overnight mail" does not insure timely filing. To obtain review of a removal order issued against an alien, petitioner must file the petition within 30 days from the order. The Ninth Circuit has held that this is a jurisdictional requirement and when the petition was filed on the 31st day, the District Court lacked jurisdiction to hear the case. In *Magtanong v. Gonzales* (9th Cir.; July 23, 2007) 494 F.3d 1190, [2007 WL 2080151], petitioner had sent the petition by "overnight mail" via DHL on the 29th day after the order. Unfortunately "overnight" doesn't always happen. And it did not happen here. As a result the petition was filed one day too late and Mr. Magtanong lost his chance to obtain judicial review of the deportation order.

Stipulated judgment subject to 10-year statute for renewal. *Code Civ. Proc.* §337.5 (3) provides that

an action to renew a judgment must be filed within 10 years after the judgment was entered. Normally the 10-year period does not begin to run until the judgment is final, e.g., after determination of an appeal, or when the time for appeal has run. But where there is a stipulated judgment, the 10-year period begins to run immediately upon entry of the judgment because no appeal is contemplated from such a judgment. *The Cadle Company II, Inc. v. Sundance Financial, Inc.* (Cal. App. Fourth Dist., Div 1; August 24, 2007) 154 Cal.App.4th 622, [64 Cal.Rptr.3d 824, 2007 DJDAR 12980].

Single settlement offer to plaintiff acting in multiple capacities is valid. *Code Civ. Proc.* §998 includes a procedure for the service of a statutory offer to have judgment entered and provides that, if offerees receive a less favorable result after trial, they incur certain penalties, including an award of expert witness fees to the offeror. Generally the statute does not cover the situation where such an offer is made in a single amount to more than one party without apportionment. *Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, [135 Cal.Rptr.2d 404, 2003 DJDAR 6116]. But where a single plaintiff sued in more than one capacity, a single offer was sufficient under the statute. *Peterson v. John Crane, Inc.* (Cal. App. First Dist., Div 5; August 23, 2007) 154 Cal.App.4th 498, [65 Cal.Rptr.3d 185, 2007 DJDAR 12889].

Reinsurance information not discoverable. *Code Civ. Proc.* §2017.210 authorizes limited discovery of a defendant's insurance coverage information to facilitate settlement. But the statute does not permit discovery of reinsurance information to facilitate settlement of an underlying tort action. *Catholic Mutual Relief Society v. Sup.Ct. (Roman Catholic Archdiocese of San Diego)* (Cal.Supr.Ct.; August 27, 2007) 42 Cal.4th 358, [165 P.3d 154, 64 Cal.Rptr.3d 434, 2007 DJDAR 13037].

Privacy rights do not shield identity of peace officers or salaries of public employees. In two companion cases the California Supreme Court ruled that California Public Records Act (*Gov. Code* §6250 ff.) trumps the privacy rights of public employees and requires the disclosure of names of peace officers (*Commission on Peace Officer Standards and Training v. Sup.Ct.* (Cal.Supr.Ct.; August 27, 2007) 42 Cal.4th 278, [165 P.3d 462, 64 Cal.Rptr.3d 661, 2007 DJDAR 13089]) and the salaries of public employees. (*Int'l Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Sup.Ct.* (Cal.Supr.Ct.; August 27, 2007) 42 Cal.4th 319, [165 P.3d 488, 64 Cal.Rptr.3d 693, 2007 DJDAR 13105].)

Manufacturer has burden of proof on risk-benefit theory. One basis for liability based on design defect is that the benefits of the design do not outweigh the risk of danger inherent in the design. *See, McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, [123 Cal.Rptr.2d 303, 2002 DJDAR 8846]. In such a case plaintiffs need only provide evidence that the design caused their injuries and then the burden shifts to the manufacturer to demonstrate that the benefits of the design outweighed its inherent risks. *Gonzalez v. Autoliv ASP, Inc.* (Cal. App. Second Dist., Div. 8; August 27, 2007) 154 Cal.App.4th 780, [64 Cal.Rptr.3d 908, 2007 DJDAR 13136].

Class arbitration waiver struck in wage and hours suit. The California Supreme Court held that, in an action for overtime compensation, a class arbitration waiver clause violates the statutory rights of workers under *Lab. Code* §510. *Gentry v. Sup.Ct. (Circuit City Stores, Inc.)* (Cal.Supr.Ct.; August 30, 2007) 42 Cal.4th 443, [165 P.3d 556, 64 Cal.Rptr.3d 773, 2007 DJDAR 13433].